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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 96

A. T. GORDON, ET AL., *Petitioners*,

v.

GRANVILLE H. LANCE, ET AL., *Respondents*.

On Writ of Certiorari to the Supreme Court of Appeals of West Virginia

BRIEF OF NATIONAL SCHOOL BOARDS ASSOCIATION, AMICUS CURIAE IN SUPPORT OF POSITION OF RESPONDENTS

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BRIEF OF NATIONAL SCHOOL BOARDS ASSOCIATION, AMICUS CURIAE IN SUPPORT OF POSITION OF RESPONDENTS

This brief is filed with the written consent of the parties, pursuant to Rule 42.2, Revised Rules of the Supreme Court of the United States. It supports and augments the Respondents' position asserting that the provisions of the West Virginia Constitution and

state statutes requiring an extraordinary majority unconstitutionally debases and dilutes the votes of Respondents in a referendum to approve the issuance of general obligation bonds and to authorize excess tax levies.

INTEREST OF NATIONAL SCHOOL BOARDS ASSOCIATION

The National School Boards Association is a nonprofit corporation organized under the laws of the State of Illinois for the purpose of working for the adequate and equitable financial support of the public schools and for other purposes which tend to improve public education in the United States (NSBA Constitution, Article II).

NSBA currently making its 30th year of service is a federation composed of (a) the membership of each of the fifty state school boards associations; (b) the direct affiliation of local school boards which are members of state associations; and (c) the affiliation of groups which presently include community college trustees, attorneys for school boards, and a special group of large city board members. In total the association represents approximately 84,000 school board members or trustees, who in turn, are responsible for the education of over 95 percent of the nation's public school children. It is these citizen leaders who must fiscally manage local budgets and raise monies for education through the taxing powers they possess.

Each year a Delegate Assembly determines association policy which is articulated in the form of Resolutions. With respect to the question presented in the present case, *Gordon* v. *Lance,* the 1970 Delegate Assembly adopted Resolution 4 which reads as follows:

RESOLUTION 4

State Laws Requiring More Than a 50 Percent Voter Approval on School Issues

The National School Boards Association believes that state referendum provisions requiring state school financing issues to be approved with the concurrence of an excess of a majority of the electorate, rather than majority vote, are unfair and inconsistent with the principle of democracy. Accordingly, the National School Boards Association advocates that state and local agencies take steps to bring about change in these laws—including court action, if that is necessary.

The Resolution takes specific issue with laws requiring a majority vote of the electorate in order to exemplify—not to limit—NSBA's total opposition to any type of legislation which, in effect, requires school issues to be approved by more than a majority of the actual voters.

At the time of this suit, NSBA is painfully aware that many of the school boards which it represents are suffering financial crises, to the detriment of public education, because of discriminatory laws which are similar to the one here at issue.

> . . . In the last five years voters of Senora, California have passed school bond issues by over sixty percent majority on three different occasions. The issues failed because of California's two-thirds voter approval requirement. As a result, children have had to attend school on a double session basis for three years.
>
> . . . In Danvers, Massachusetts in the spring of 1970, a $13.6 million school bond referendum received a majority vote but failed to achieve the necessary two-thirds vote. As a result of over-

> crowding, all special services for this fall school year have been cancelled. This includes all tutorial programs, remedial reading for the disadvantaged and many elementary school hot lunch programs.

Time and space does not permit a review of all school districts on which the extraordinary majority requirements are having a similar adverse effect. In this connection, reference should be made to a special finance study[1] completed this year which lists 14 states which have laws similar to the one here in question. Of the hundreds of school districts therein, we are aware that many others have faced financial crises in the past because of extraordinary majority laws and many others will in the future.

Accordingly, pursuant to the constitutional purpose of NSBA, the mandate of the NSBA Delegate Assembly, and the effect which extraordinary majority requirements have on the school districts which NSBA represents, we respectfully submit this brief *Amicus Curiae*.

SUMMARY OF ARGUMENT

As applied to a routine popular voting situation, on questions such as bond issues, with none of the special concerns which may surround approval of constitutional amendments, an extraordinary majority requirement is unconstitutional both under the equal protection of the laws clause and the due process of law clause of the Fourteenth Amendment.

Under the equal protection clause this Court has developed a "one man-one vote" doctrine, protecting

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[1] Barr, Financing Public Elementary and Secondary School Facilities in the United States 123-24 (June 1970).

voter participation in the political process, under which county unit systems of vote weighting, population inequality in legislative districts, and restrictions on the franchise in certain special purpose elections, have been declared unconstitutional. The extraordinary majority requirement likewise affects voter participation in the political process. Its operative effect is to block bond issues even if supported by a majority of those voters expressing a preference, unless the "yes" votes reach the specified percentage above a simple majority. Something in the nature of a minority veto power is thus created. Hence, extraordinary majority requirements are analogous in their operation and effect to the vote weighting which occurs in the voting systems recently invalidated in the "one man-one vote" cases, and are equally unconstitutional because in effect similar voters are accorded dissimilar political power.

However, Respondents recognize the reluctance of some courts and commentators to extend the equal protection theory of "one man-one vote" to extraordinary majority requirements,[2] in part because voter turnout in issue voting is typically very low, thus creating special popular consensus problems, and in part because of fears that the equal protection approach would get out of hand and invalidate every possible use of

[2] It is true that the equal protection clause approach does invite a simple one-to-one comparison of status and influence, and when the so-called stringent test of *Kramer* v. *Union Free School District*, 395 U.S. 621 (1969), and similar cases is added, a near insurmountable burden of proof passes to the state to justify any classification or distinction whatsoever. Under the test of *Kramer* and similar cases, once the right at issue is initially determined to be "fundamental," then any classification which limits that right violates equal protection unless the state can show a "compelling state interest."

extraordinary majority requirements, even in the constitutional amendment area.[3] There also are numerous provisions for extraordinary majorities in the operations of Congress and state legislatures.[4]

Respondents second ground for the unconstitutionality of extraordinary majority requirements is the due process clause of the Fourteenth Amendment, a ground of decision which would not be subject to the overreach fears which have been expressed by some concerning the equal protection argument. Under the due process clause governmental actions are unconstitutional if directed to an illegitimate end, and also are unconstitutional if the means used have no reasonable or rational relation to a legitimate end. Extraordinary majority requirements violate due process, because, even if a provision for effective voter review of policy proposals be permissible, and a concern for a broad consensus be legitimate, the extraordinary majority requirement creates an overcorrection against low voter turnout. In other words, if only a small fraction of voters vote on the issue, the extraordinary

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[3] Some states have required not only an extraordinary majority in the legislature to propose a state constitutional amendment, but also an extraordinary majority in the popular ratification process. For example, in New Mexico an extraordinary majority continues, although the added requirement that it exist also in each county has been invalidated. *State ex rel. Witt* v. *State Canvassing Board*, 78 N.M. 682, 437 P.2d 143 (1968).

[4] *United States Constitution:* Art. I, § 3 (conviction on impeachment); Art. I, § 5 (expulsion from Congress); Art. I, § 7 (overriding executive veto); Art. II, § 2 (ratification of treaties); and Art. V (constitutional amendment); *California Constitution* (partial): Art. IV, § 8 (d) (passage emergency legislation); Art. IV, §§ 10 (a) & (b) (overriding executive veto); Art. XI, § 2 (removal of county seat); *Michigan Constitution:* Art. 7, § 25 (purchases by state); *Nebraska Constitution:* Art. 5, § 2 (legislative acts to be declared unconstitutional by state Supreme Court).

majority may have some "consensus" creating effect; but if substantially all of the eligible voters vote on the issue, the requirement constitutes overcorrection and creates minority control of the political process.

ARGUMENT

I. REQUIRING AN EXTRAORDINARY MAJORITY FOR APPROVAL OF BONDS AND EXCESS TAX LEVIES VIOLATES THE EQUAL PROTECTION CLAUSE OF THE UNITED STATES CONSTITUTION BY DEBASING AND DILUTING THE VOTE OF THE VOTER FAVORING THE PROPOSITION ON THE BALLOT.

The extraordinary majority requirements, which Respondents claim, and the Court below found to be repugnant to and therefore prohibited by the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, are in Article X, §§ 1 and 8 of the West Virginia Constitution. These provisions, and the enabling legislation in support thereof, directed that tax levies and bond issues to be effective had to obtain the approval of at least sixty percent of the qualified voters in the first instance and three-fifths of all votes cast in the second. At a special election held in April, 1968, the Board of Education of Roane County, West Virginia, submitted propositions to the electorate to authorize the issuance of school improvement bonds and to levy taxes in excess of the maximum theretofore authorized.

These propositions were defeated, in that the requisite three-fifths majority approval was not obtained even though a simple favorable majority of 51.55 percent and 51.51 percent respectively was obtained. This challenge to the constitutionality of the extraordinary majority requirements ensued.

This Court has consistently upheld the right of suffrage as "a fundamental matter in a free and demo-

cratic society. . . . [and] since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized." *Reynolds* v. *Sims,* 377 U.S. 533, 561-62 (1964). The franchise need not be granted by a state to the electorate on particular issues or matters of governmental policy, but once conferred "lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment", *Harper* v. *Virginia State Board of Elections,* 383 U.S. 663, 665 (1966), nor may classifications then be constructed which discriminate on the basis of race, wealth, geography, property ownership or military service. Some rational classifications, consistent with constitutional protections and a compelling state interest, may be delineated, but "once the class of voters is chosen and their qualifications specified, [this Court can] see no constitutional way by which equality of voting power may be evaded." *Gray* v. *Sanders,* 372 U.S. 368, 381 (1963).

It has been argued, that no classification of voters in fact exists in the instant case; see Brief of Hayes Smith, Amicus Curiae, in support of Petitioners, 15, and Comment, Extraordinary Majority Voting Requirements, 58 *Geo. L.J.* 411, 419 (1969); that these individual voters do not neatly fall into classes such as may be differentiated by residence location, property ownership or military service, all of which then would be protected by recent decisions of the Court. *Baker* v. *Carr,* 369 U.S. 186 (1962); *Cipriano* v. *Houma,* 395 U.S. 701 (1969); *Carrington* v. *Rash,* 380 U.S. 89 (1965). However, such a view ignores

the basic and invidious classifications based on the very thought processes of the individual voter on a particular issue. If it can be said that classifications to exclude the franchise based on mere physical differences such as race or wealth are constitutionally abhorrent to a free society, consider how much more dangerous to the very fabric of our democratic principles is a classification which debases the right of franchise or seeks to control the outcome of an election based on the ideas or opinions of the electorate, absent the demonstration of a compelling state interest. Once the lines of the issue before the electorate are drawn, and the individuals who plan to cast their ballots have made the necessary decisions pro and con, the two classifications have begun to take on an identity not entirely dissimilar to racial or property-owner classifications. But when at last the ballots have been cast the class composition finally is fixed, and each active voter can then identify with and consider himself a part of one of two classes—those favored or not favored by the weighting given his vote by the extraordinary majority requirement of the state statute or constitution. It is not sufficient to say that each voter may rely on the assurances that all constitutionally qualified electors may vote and that each individual's ballot will be *counted* equally with every other ballot—all being tallied as one each. The reason is that for a "yes" voter to reach true equality with the "no" voter, one out of every three "yes" ballots must be discarded as weightless when determining the extraordinary majority result. Equal protection to him becomes a meaningless pronouncement from on high.

This Court's rationale in *Gray* v. *Sanders, supra,* has a unique precedential status insofar as the extraordi-

nary majority requirement is concerned. Though the factual details of *Gray* do not identify precisely with those of *Lance,* a sufficient family resemblance exists to allow bed-sharing without a further introduction. In *Gray* an office was at stake—in *Lance* an issue; but both are single constituency cases. It has been said that "*Gray* was very close to being a simple 'right to vote' case and hence the true home of a 'one person, one vote' slogan. In a contest for a single office [or issue], why should not the front-runner in the popular vote win?" Dixon, *Democratic Representation* 177 (1968). And, it may be asked, why should not the front-runner win without the unequal handicap of a three-fifths majority requirement to overcome? This Court in *Gray* held that

> The concept of 'we the people' under the Constitution visualizes no preferred class of voters but equality among those who meet the basic qualifications. The idea that every voter is equal to every other voter in his State, when he casts his ballot in favor of one of several competing candidates [or issues], underlies many of our decisions . . . . The only weighting of votes sanctioned by the Constitution concerns matters of representation, such as the allocation of Senators . . . and the use of the electoral college. . . . 372 U.S. at 379-80.

It should be recognized that in a representative or single member district election some dilution of a person's vote is to be expected and accepted since people are not fungible Within any legislative district the winner-take-all rule operates and the minority takes nothing. But in a direct election for an office or an issue such dilution is not only unnecessary but unacceptable.

Dominant in Chief Justice Earl Warren's opinions in the 1964 *Reapportionment Decisions*

> is the ideal that as nearly as possible all men should count as one politically, however different their other circumstances. Such an idea has been one of the vital components of American political development. The broadening of the franchise is one basic level in an egalitarian political ideal. A second level concerns voting rules regarding the filling of elective office once the breadth of the franchise has been settled. Practically, if not logically, the ideal becomes associated here with a simple plurality principle inside a given constituency, because of the impossibility of getting unanimity and the likelihood that control of the many by the few could result from more complicated choice systems. This is all that was involved in . . . *Gray* v. *Sanders.* Dixon, *supra,* at 582-83.

Control of the many by the few has been the overriding result in the school, county, and city bond elections where an extraordinary majority requirement has been in effect across the nation. One recent study, in 1966-67, found that only 40.4 percent of the proposals were approved by the requisite two-thirds majority requirement, while 80.8 percent of them received more than a simple majority of favorable votes. Also, during a 10-13 year period, two studies of voting results in the Los Angeles and San Francisco urban areas indicated that about one-half of all the bond proposals were defeated, while at the same time virtually all received more than a simple majority. This is *not* equal protection![5] Public Affairs Report, Bulletin of the Institute of Governmental Studies, Vol. 10, No. 4, August 1969, University of California, Berkeley.

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[5] " 'One man-one vote' is the symbol really of an aspiration for fairness, for avoidance of complexity, for intelligibility in our representational process in a mass democracy—indeed, for a sense of meaningful membership in the *polis.*" Dixon, *supra,* at 587.

Those who fear that the extension of the one-man, one-vote concept may lead to intrusions on other extraordinary majority requirements in the legislative or judicial arenas if the Court below is upheld may have erected a straw man. Authority in West Virginia and elsewhere for impeachment of state Senators by two-thirds vote of the elected members, amendment of the state constitution by a two-thirds approving vote of both houses of the legislature with a subsequent statewide referendum, and expulsion of a legislator by two-thirds vote of the entire membership of that house, all point to a compelling state interest in those requirements, as well as a lack of any personal interest of the electorate to be protected through equality of vote weighting.

The individual interests of the voters in having an equal voice in the outcome of bond and tax elections in West Virginia, no matter what the voter's individual persuasion, are fundamental rights; and, without an overriding compelling state interest having been shown, are within the protection guaranteed by the Fourteenth Amendment to the Constitution of the United States.

II. THE EXTRAORDINARY MAJORITY REQUIREMENT FOR BOND ISSUES AND TAX INCREASES IS IN ANY EVENT VIOLATIVE OF THE DUE PROCESS OF LAW CLAUSE OF THE FOURTEENTH AMENDMENT, EVEN IF DIFFICULTIES BE DEEMED TO EXIST IN THE EQUAL PROTECTION ARGUMENT EXTENDING "ONE MAN-ONE VOTE" TO THIS AREA.

A. Alleged Infirmities in the Equal Protection Argument.

The issue posed by this appeal raises a broad, complex public law question transcending the personal or immediate interests of the parties. Respondents are aware of the difficulties which some commentators have seen in moving directly from the "one-man one-vote"

principle of the legislative reapportionment and redistricting cases[6] to a rule that extraordinary majority requirements for approval of bond issues, or certain tax increases, are *per se* unconstitutional. A similar difficulty has been perceived in resting such a rule on the authority of the recent franchise cases.[7] These difficulties are discussed at length in the very recent opinion of Federal District Judge Oliver in *Brenner* v. *School District of Kansas City, Missouri,* —— F. Supp. —— (1970), 39 U.S.L.W. 2122 (decided Aug. 14, 1970), explaining the decision of the three-judge court in upholding the constitutionality of the extraordinary majority requirement for bond issues in Missouri.[8]

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[6] *Kirkpatrick* v. *Preisler,* 394 U. S. 526 (1969); *Wells* v. *Rockefeller,* 394 U. S. 542 (1969); *Reynolds* v. *Sims,* 377 U. S. 533 (1964).

[7] *Kramer* v. *Union Free School Dist. No. 15,* 395 U. S. 621 (1969); *Cipriano* v. *City of Houma,* 395 U. S. 701 (1969); *City of Phoenix* v. *Kolodziejski,* 399 U. S. 204 (1970).

[8] The alleged difficulty in basing the unconstitutionality of extraordinary majority requirements on the reapportionment and redistricting cases is that these cases concern the issue of fairness and effectiveness of representation in legislative bodies elected from districts, and also involve candidate voting, not issue voting. In a system of district voting a large amount of "vote weighting," in the loose use of the term, occurs because within each district a winner-take-all rule operates. In *Reynolds* v. *Sims* and successor cases this Court has ruled that it is unconstitutional to magnify this inherent factor of vote weighting in district systems by adding the factor of unequal population among the districts. It is a large jump from *Reynolds* v. *Sims* to the present dispute whether, in issue voting in contrast to candidate voting, an extraordinary majority requirement may be supported by the considerations related to a desire to insure broad popular consensus in the face of low voter turnout, or other considerations.

The stated difficulty in basing the unconstitutionality of extraordinary majority requirements on the recent franchise cases (concerning limitations on the school electorate or on the municipal

Respondents submit that the argument presented in Part I of this brief, with its strong reliance on *Gray* v. *Sanders,* 372 U.S. 368 (1963), surmounts or avoids these difficulties. It also may be noted that the rather negative reception in the Law Reviews of the West Virginia Supreme Court's ruling in *Lance* seems to be based not so much on a desire to preserve every form of extraordinary majority requirement, as on a fear of possible overreach in extending recent equal protection theory in simplistic fashion without analysis of the interests involved. It has been suggested that various "policy justifications would seem to support the proposition that a standard more flexible than the mathematical exactitude of one man-one vote should be utilized in the case of extraordinary majority requirements."[9]

Whether or not these fears of overreach in equal protection analysis are valid, they do invite considera-

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bond electorate) is simply that no apparent franchise issue is posed by the present extraordinary majority requirement in issue voting by the *total* electorate. Rather, the quite different issue is raised of what rules are to be used in determining the outcome of the voting, bearing in mind that the expressed voter preference "yes" or "no" on the issue may range from a tiny fraction of the total eligible electorate to an absolute majority. In addition, the decision of this Court in *McDonald* v. *Board of Election Comm'rs,* 394 U. S. 802 (1969) may be a not inconsiderable obstacle because it might appear that the classification sustained there in regard to the franchise, under which absentee ballots were denied to those unable to post bail, was a more invidious discrimination than the adverse effect on the "yes" voters of a sixty percent majority requirement for approval of a bond issue.

See also, *Westbrook* v. *Mihaly,* 471 P. 2d 487 (Calif. 1970); *Bogert* v. *Kinzer,* 465 P. 2d 639 (Idaho 1970).

[9] Comment, "Extraordinary Majority Voting Requirements," 58 *Geo. L. J.* 411, 425 (1970). See also 70 *Col. L. Rev.* 486, 502-03 (1970); 56 *Va. L. Rev.* 295, 328-30 (1970); 83 *Harv. L. Rev.* 1911, 1923 (1970).

tion of possible alternative grounds for holding unconstitutional the extraordinary majority requirement in the form it takes in the *Lance* case. The obvious alternative is the due process clause of the Fourteenth Amendment, which is well-adapted to case by case scrutiny of state policy to ascertain whether it is rationally related to a legitimate state purpose.

B. The Extraordinary Majority Requirement at Issue in Lance Violates the Due Process Clause of the Fourteenth Amendment Because It Operates To Give a Minority the Power To Block Effectuation of Needed Public Action, as Well as To Safeguard Against Low Voter Turnout.

Older than equal protection concepts as an effective instrument for curbing excesses in state policy, and indeed overlapping equal protection arguments in many cases in which equal protection has been used,[10] is the due process concept that governmental ends must be legitimate, and the means used must be reasonably adapted to those ends. The due process inquiry is whether the challenged law has "a reasonable relation to a proper legislative purpose," and is "neither arbitrary nor discriminatory." *Nebbia v. New York,* 291 U.S. 502, 537 (1934). It is common knowledge that use of the due process clause to invalidate state economic legislation has virtually ceased, but this has not repealed the due process clause as a check on arbitrary state policy in non-economic fields. *Griswold* v. *Connecticut,* 381 U.S. 479 (1965).

In *Baker* v. *Carr,* 369 U.S. 186 (1962) itself, relief was sought by the plaintiffs both under the due process and equal protection of the law clauses of the Fourteenth Amendment. Although the due process ap-

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[10] *Skinner* v. *Oklahoma,* 316 U. S. 535 (1942).

proach dropped out in the ultimate disposition of the case, it is apparent that due process is a concurrently available rationale for many if not all of the "one man-one vote" legislative apportionment cases. In this field, minority process is not due process. Without going so far as to extract a flat requirement of majority rule in all instances, the proposition reasonably can be stated that a legislative representation election system is arbitrary and lacking in due process if it can be shown—as Mr. Justice Stewart phrased it in the Maryland reapportionment case—to operate "systematically to prevent ultimate effective majority rule." *Maryland Committee for Fair Representation* v. *Tawes,* 377 U.S. 656, 677 (1964). The proposition takes on added force in the light of the existence in the Constitution, Article IV, Section 4, of the clause directing the federal government to "guarantee to every state in this Union a republican form of government." In *Gray* v. *Sanders,* 372 U.S. 368 (1963), invalidating Georgia's county unit system of popular vote weighting in statewide (single constituency) elections, under which the second-runner could possibly defeat the front-runner, the Court appealed to developing American history to support the arbitrariness of such a system, even though the opinion was not rested squarely on due process grounds.

Speaking in *Gray* of the non-majoritarian aspects of our Constitutional beginnings, including the electoral college system of electing a President, Justice Douglas said:

> Passage of the Fifteenth, Seventeenth, and Nineteenth Amendments shows that this conception of political equality belongs to a bygone day, and should not be considered in determining what

the Equal Protection Clause of the Fourteenth Amendment requires in statewide elections.[11]

Turning now to the case before the Court, it can be demonstrated that the extraordinary majority requirement in *Lance* is so ill-adapted to achievement of legitimate state ends that it is too arbitrary to pass muster under the due process clause, even with the burden of proof resting, conventionally, on the plaintiff. At the same time, the constitutionality of alternative devices to ensure deliberation and an adequate expression of popular feeling in issue elections, in contrast to candidate elections, can be shown not to be put in question.

The practicalities of the matter are the essence in this case. As pointed out in many of the Amicus Briefs for Petitioners filed with this Court, and as elaborated in various Law Review comments, *supra,* extraordinary majority requirements have a long history in this country, are extremely numerous, and are supported by a variety of asserted public policy considerations. This material need not be repeated here.

Possibly relevant considerations which emerge are (1) the nature and breadth of the "consensus argument," i.e., that new undertakings in areas such as schools need broad popular support if they are to be carried through effectively, and that without an extraordinary majority requirement small percentages of the total electorate will irrevocably commit all to a long-term debt; (2) the effect of the extraordinary majority requirement on the operation of the legislative process, i.e., the possibility of "buck-passing" because of the division of responsibility which the ref-

[11] 372 U. S. at 377 n. 8.

erendum creates; (3) the extent to which extraordinary majority requirements do encourage or ensure fiscal responsibility in the light of alternative borrowing devices and financing arrangements which can be invoked without use of a popular referendum (the extraordinary majority requirement generally being required only for general obligation bonds); (4) the facts concerning voter turnout in bond referenda elections, i.e., over the years and on various kinds of proposals what percent of the total eligible electorate actually participate in such issue elections, is the participation far lower than in candidate elections, is the participation so low as to question whether there has been any effective view expressed unless an extraordinary majority is required, is it valid to assume that those who do not take part have no interest to be protected, do voter profiles indicate that there are differences between issue voters and candidate voters, etc.

There is not time, nor is the record adequate, to explore all of these possibly relevant considerations concerning the constitutional question now before the Court. On many of these questions adequate empirical data may not exist. Helpful and provocative in this connection is the report entitled "The Extraordinary Majority Requirement in California," Institute of Governmental Affairs, University of California at Davis, especially the papers therein by Donald G. Hagman, Alvin D. Sokolow, and Alan K. Browne.

However, a more simple formulation of the issue in due process terms is available, which demonstrates that the extraordinary majority requirement in *Lance,* and similar cases, is an arbitrary and unreasonable

restraint on the political process, not justified by the ends allegedly served.

First, whatever may be the desired rule regarding constitutional amendments, or laws which change the basic structure or procedure of government, there is no need for an extraordinary majority requirement regarding ordinary policy determinations of government relative to regulatory or service programs of one sort or another. Indeed, such a requirement is inconsistent with the basic concepts of a republican form of government, inhibits political democracy at its inception, and disables government from serving society and meeting new needs. If, for various reasons, certain kinds of policies are suspect, they should be flatly prohibited, or handled through the recognized process of constitutional provision and amendment.

Second, for purposes of this case, however, it may be conceded that it is reasonable for a state to wish to ensure that some kinds of programs such as local bond issues receive special voter attention, and be undertaken only with widespread voter support, *provided* a minority veto power is not created. A popular referendum is one way to achieve special voter attention, but must be used with some caution because of the serious problem of low voter turnout, and voter inattention to the issue questions on the ballot even by the voter who does go to the polls. For example, and this appears to be a common experience, in Missouri a study showed that in 29 special bond elections the vote cast averaged less than a third of those voting for governor. Missouri Public Expenditure Survey Staff Report, "Changing Requirement for Voting Bonds: A Decision to be Approached With Caution," 25 (1965), cited in *Brenner* v. *School District of*

Kansas City, Missouri, —— F. Supp. —— (1970), 39 U.S.L.W. 2122 (decided Aug. 14, 1970). The question is not voter review, but effective voter review.

Third, one way to provide for meaningful voter participation on issues thought to require special attention, without creating a minority veto power, is to require a simple majority but to change the "quorum" or base, e.g., to require a majority of the electors residing and entitled by law to vote within the area to be affected. This is the exact provision used in South Carolina regarding elections on the issue of incorporating new municipalities. The provision recently was held constitutional by the Supreme Court of South Carolina in the face of a "one man-one vote" attack, and this Court denied review for want of a substantial federal question. *Clay* v. *Thornton,* 169 S.E. 2d 617 (1969), appeal dismissed for want of a substantial federal question, sub nom. *Turner* v. *Clay,* 397 U.S. 39 (1970).

Fourth, a related way to provide for meaningful voter review, without creating a minority veto power, would be to require a "quorum", or voter base, less onerous than *all* qualified voters, but higher than a mere majority of those voting on the bond issue. Thus, legislatures might be able to develop a reasonable voting requirement that combines the majority vote principle with the electoral turnout.

Fifth, the use of an extraordinary majority requirement as in *Lance,* is not a constitutional way to achieve the purpose of effective voter review, without creating minority veto power. At one extreme, if we assume

a low voter turnout, a sixty percent majority requirement or even a two-thirds requirement at as in California, might still permit a small fraction of the total electorate to control the issue, as Missouri experience has shown. Survey Staff Report, *supra*. At the other extreme, if we assume a high voter turnout approaching the total electorate, the extraordinary majority requirement goes too far, and creates actual minority control of the voting process. In the former instance the extraordinary majority requirement may possibly be a helpful correction in the direction of ensuring a higher consensus, but in the latter instance it automatically creates an overcorrection. This overcorrection is analogous to the "built-in" inequity which this Court perceived when it invalidated the Missouri system of apportionment of trustees on junior college district boards of trustees. *Hadley* v. *Junior College District*, 397 U.S. 50 (1970). In due process terms, the across-the-board extraordinary majority requirement in *Lance* violates due process because it has no reasonable or rational relationship to the purpose of ensuring meaningful voter participation on certain kinds of issues, even if it be assumed that the latter end is valid.

CONCLUSION

For the reasons hereinabove set forth this Court should affirm the judgment of the Supreme Court of Appeals of West Virginia which held that the extraordinary majority requirements of Article X, Sections 1 and 8 of the Constitution of West Virginia, and the statutory provisions in support thereof, were in conflict with and violative of the Equal Protection

Clause of the Constitution of the United States and therefore unconstitutional and unenforceable.

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Respectfully submitted,

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